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No. 1051

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

BENJAMIN RITHOLZ

Petitioner,

vs.

RICHARD B. OGILVIE, Sheriff of Cook County, Illinois, successor in office to Frank G. Sain,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

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PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI

Benjamin Ritholz, petitioner herein, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Illinois, entered in the case of *The People of the State of Illinois, ex rel. Benjamin Ritholz* v. *Frank G. Sain, Sheriff of Cook County*, on November 30, 1962.

Citations to Opinions Below

The opinion of the Supreme Court of Illinois is printed in Appendix A hereto, *infra* p. 29, and is reported *Sub Nom. People ex rel. Ritholz* v. *Sain*, 26 Ill. 2d 455, 187 N.E. 2d 241.

Jurisdiction

The judgment of the Supreme Court of Illinois was entered on November 30, 1962. A timely petition for rehearing was denied on January 28, 1963. The jurisdiction of this court is invoked under 28 U.S.C., section 1257(3).

Question Presented

Whether, in a case involving the extradition of one who is claimed to be a fugitive from justice, a previous attempted extradition of the alleged fugitive from the same asylum state to the same demanding state for the same crime bars the extradition of the alleged fugitive where the previous attempted extradition was held to be invalid by the courts of the asylum state because of the failure of the demanding state to proceed upon the proper theory of extradition and that theory was available to the demanding state at the time of the previous attempted extradition.

Constitutional and Statutory Provisions Involved

The Constitutional provision involved in this case is Article IV, Section 2, clause 2 of the Constitution of the United States. It is printed in Appendix B, *infra*, p. 32. The statutory provisions involved are Title 18, United States Code, Section 3182, and Sections 2 and 3 of the Illinois Uniform Criminal Extradition Act, (Ill. Rev. Stat. (1961) Chapter 60, Sections 19 and 20). They are printed in Appendix B, *infra*, pp. 32, 33.

Statement

The federal questions sought to be reviewed arise from the fact that the petitioner is here questioning the validity of his extradition from the State of Illinois to the State of Michigan as a fugitive from justice. The extradition was ordered by the governor of Illinois by a warrant of extradition which recited that it was issued "in compliance with the Constitution and the laws of the United States" (Tr. 2). The Federal question also arises from the fact that rights and basic procedures of the extradition of fugitives from justice from one state to another are created and controlled by Article IV, Section 2, clause 2 of the Constitution of the United States and Title 18, United States Code, Section 3182. *Prigg* v. *Pennsylvania*, 16 Pet. 539, *Kentucky* v. *Dennison*, 24 How. 66, *Innes* v. *Tobin*, 240 U.S. 127, *United States ex rel McCline* v. *Meyering*, 75 F.2d 716, *People ex rel Hackler* v. *Lohman*, 17 Ill.2d 78.

Facts

The petitioner herein was apprehended under a Warrant issued by the Governor of the State of Illinois on January 31, 1962, which recited:

> The Governor of the State of Michigan demands of me the arrest and delivery of Benjamin D. Ritholz as a fugitive from justice, and has produced and laid before me a copy of the record of his conviction of the crime of Offering and Giving a Bribe to Public Officers With the Intent and Purpose to Influence Their Acts, Opinions, Decision and Judgments in Connection with a Certain Proceeding, to-wit: a Hearing on a Complaint then Pending Before Said Public Officers as Members of the Michigan State Board of Examiners of Optometry; and the said Benjamin D. Ritholz having been duly tried, convicted, sentenced and fined on August 6, 1956, and such conviction and sentence was appealed to and affirmed by the Supreme Court of Michigan on June 6, 1960, and the said

> Benjamin D. Ritholz was admitted to bail pending the outcome of his appeal, that he forfeited his bond, and that he became a fugitive from justice of the State of Michigan by his failure to surrender himself upon the affirmance of his conviction, which the said Governor certifies as being authentic, and duly authenticated, and being satisfied that the said Benjamin D. Ritholz fugitive from justice and has fled from the said State of Michigan and has taken refuge in this State.

A petition for a writ of *habeas corpus* was filed on behalf of the petitioner to test the legality of the arrest under said warrant. (Tr. 4-5). The Criminal Court ordered the writ issued and the respondent made return alleging:

> That Benjamin Ritholz, the relator, is in his custody by and under the authority of a Governor's warrant of rendition, issued by the Governor of the State of Illinois upon the requisition of the Governor of the State of Michigan; and respondent alleges that all the papers are legal; that the relator is a fugitive from justice; that he is substantially charged with an offense against the laws of the State of Michigan; that he was convicted of the offense set forth in the said Governor's warrant of rendition, sentence was imposed against him, and that a warrant for his removal to prison was issued; that he is the person named in the extradition papers and in the Governor's warrant of rendition. (Tr. 14.)

The petitioner then filed his verified traverse to the return which alleged as follows:

> 1. That on the 16th day of December, 1960, the Honorable G. Mennen Williams, then Governor of the State of Michigan, did make demand of the Honorable William G. Stratton, then Governor of the State of Illinois, for the return of the relator herein to the State of Michigan as a fugitive from the justice of the State of Michigan.

2. That on the 16th day of December, 1960, the said William G. Stratton, then Governor of the State of Illinois, did issue his warrant for the arrest of the relator for the purpose of delivering the relator into the custody of the agent of the Governor of the State of Michigan for the return of the relator to the State of Michigan.

3. That thereafter the relator herein filed his petition for writ of *habeas corpus* on the 21st day of December, 1960 in the Criminal Court of Cook County in Case No. 42868 entitled *People of the State of Illinois, ex rel. Benjamin D. Ritholz* v. *Frank G. Sain, Sheriff of Cook County, Illinois*, in which the relator alleged:

> (1) that the requisition and papers were not in regular and legal form, (2) that he was not substantially charged with a crime against the laws of the demanding State, and (3) that he was not a fugitive from the justice of the demanding State.

4. That upon hearing said petition and the return of the respondent therein, the said writ of *habeas corpus* was sustained and the relator therein who is the relator herein was discharged.

5. That thereafter an appeal was taken to the Supreme Court of the State of Illinois and the order of the Criminal Court of Cook County sustaining the petition for writ of *habeas corpus* was affirmed.

6. That the subject matter of the aforesaid Case No. 42868 entitled the *People of the State of Illinois ex rel. Benjamin Ritholz* v. *Frank G. Sain, Sheriff of Cook County, Illinois* which resulted in the discharge of the relator was in all respects identical with the subject matter of this case, including the reasons for the demand by the Governor of the State of Michigan for the return of the relator herein; and the order of this Court in the said case No. 42868, as affirmed by the Supreme Court of the State of Illinois, is de-

terminative of all issues concerning the return of the relator herein to the State of Michigan as a fugitive from justice upon the warrant of the Governor of the State of Illinois now before this Court; and this Court cannot order the relator herein returned to the State of Michigan, and to do so would constitute a denial to the relator of his liberty without due process of law as guaranteed to him by the Constitution of the State of Illinois and the XIVth Amendment to the Constitution of the United States. (Tr. 17-18.)

A hearing was had on the writ of *habeas corpus*, return and traverse (Tr. 105-128) at which time the respondent placed in evidence the warrant (Tr. 114) and the requisition papers (Tr. 116). The only question before the trial court was whether the matter presented by the traverse stated a sufficient defense to extradition. (Tr. 117-121.) Briefs were filed by both parties in the trial Court which delineated the factual issues as follows:

Excerpt from Relator's Brief

(Page 1 and 1st Para. p. 2, Relator's Brief in Criminal Court)

The relator herein, Benjamin D. Ritholz, is contesting the validity of his extradition to the State of Michigan, pursuant to a warrant issued by the Governor of Illinois on the 31st Day of January, 1962. By traverse to the return of the respondent sheriff of Cook County, Illinois, the relator has set forth allegations that a previous *habeas corpus* proceeding is determinative of the issues now before the Court.

On the 16th day of December, 1960, the Governor of Illinois, proceeding upon a demand by the Governor of the State of Michigan issued a warrant for the extradition of the relator herein to the State of Michigan. The demanding papers showed that the relator

had been convicted of the crime of bribery in the Circuit Court for the County of Ingham, Michigan, on the 6th day of August, 1956, in cause 11871; that the relator had appealed that conviction to the Supreme Court of Michigan, and pending appeal had posted bond of Twenty-Thousand Dollars; that the matter was affirmed on appeal and that the relator forfeited his bond.

The requisition papers in the present case show that the relator was convicted of the crime of bribery in the Circuit Court for the County of Ingham, Michigan, on the 6th Day of August, 1956, in Cause 11871; that the relator had appealed that conviction to the Supreme Court of Michigan, and pending appeal had posted bond of Twenty Thousand Dollars; that the matter was affirmed on appeal and that the relator forfeited his bond.

Habeas Corpus proceedings in the Criminal Court of Cook County were had for the purpose of determining the validity of the extradition of the relator herein under the warrant of December 16, 1960. The Criminal Court sustained the petition for writ of *habeas corpus* and the relator was discharged. The respondent sheriff appealed. Upon appeal the Supreme Court of Illinois affirmed and said in part:

> . . . [I]t is our opinion that the requisition or demand was insufficient to justify the issuance of the rendition warrant, which is the only authority here shown for detaining the relator. Accordingly, the judgment of the criminal court of Cook County discharging the relator is affirmed.

Excerpt From Respondent's Reply Brief In Criminal Court

The respondent *accepts* the statements set forth in page one (1) and the first paragraph of page two (2) of the Relator's Brief as to the proceedings had in aid of the extradition of the relator, Benjamin D.

Ritholz, from the State of Illinois to the State of Michigan subject to the further statement which the respondent makes and which is deemed pertinent to the issue. [Emphasis added.]

The rendition warrant which was issued on December 16, 1960 in the first extradition proceedings recited that the Governor had before him a copy of a "Complaint and Warrant", whereas the rendition warrant issued on the 31st day of January, 1962 in the second proceeding recited that the Governor had before him the following:

> "A copy of the record of his conviction of the crime of Offering and Giving a Bribe to Public Officers with the Intent and Purpose to Influence Their Acts, Opinions, Decisions, and Judgments in Connection with a Certain Proceeding, to-wit: a Hearing on a Complaint then Pending Before Said Public Officers as Members of the Michigan State Board of Examiners of Optometry, and the said Benjamin D. Ritholz having been duly tried, convicted, sentenced and fined on August 6, 1956, and such conviction and sentence was appealed to and affirmed by the Supreme Court of Michigan on June 6, 1960, and the said Benjamin D. Ritholz was admitted to bail pending the outcome of his appeal, that he forfeited his bond, and that he became a fugitive from justice of the State of Michigan by his failure to surrender himself upon the affirmance of his conviction, which the said Governor certifies as being authentic, and duly authenticated, and being satisfied that the said Benjamin D. Ritholz, fugitive from justice and has fled from the said State of Michigan and has taken refuge in this State."

To further illustrate the identity of the facts of the previous attempted extradition of the petitioner with the facts in this case, we print on the following pages the affidavit of Jack A. Warren, the then prosecuting attorney of Ingham County, Michigan, in support of the first requisition, which affidavit was included in the record in the case of *People ex rel Ritholz* v. *Sain*, case number 36756, in the Supreme Court of Illinois, reported at 24 Ill. 2d 168, 180 N.E.2d 464, the judicial notice of which the Supreme Court of Illinois was asked to take in this case; and the affidavit of Leo A. Farhat, the prosecuting attorney of Ingham County, Michigan, in the present case, and which affidavit is contained in the transcript of record in the present case at pages 73 and 74.

Affidavit of JACK W. WARREN in support of first requisition.

STATE OF MICHIGAN)
COUNTY OF INGHAM)

JACK W. WARREN, being duly sworn, deposes and says that he is the only duly elected, qualified and acting Prosecuting Attorney in and for the County of Ingham, State of Michigan; that heretofore, to-wit: on the 8th day of August, 1955 the issuance of a criminal warrant was authorized charging one Benjamin D. Ritholz with the crime of Offering and Giving a Bribe to Public Officers with the Intent and Purpose to Influence Their Acts, Opinions, Decisions and Judgments in Connection with a Certain Proceeding, to-wit: A Hearing on a Complaint then Pending Before Said Public Officers as Members of the Michigan State Board of Examiners in Optometry. That the said Benjamin D. Ritholz was duly convicted of said offense by a jury. That on the 6th day of August, 1956 said defendant was sentenced to serve a term of imprisonment of not less than two years nor more than four years at the State Prison of Southern Michigan at Jackson, Michigan, and pay a fine of $2,000.00.

That thereupon said defendant appealed, after leave therefor was duly allowed, to the Supreme Court of the State of Michigan and he was admitted to bail on March 13, 1958, the bond therefor being set at $20,000.00. That the Supreme Court for the State of Michigan affirmed said conviction and sentence, continued said bond until determination of defendant's motion for rehearing and stay of imprisonment pending appeal to the Supreme Court of the United States in event of denial of rehearing, both of which motions were, on the 11th day of July, 1960 denied by the Supreme Court of the State of Michigan, all of which more fully appears from instruments and documents attached to this application.

That the said Benjamin D. Ritholz, by the terms of said $20,000.00 cash bond was obligated "if his conviction is affirmed" to "surrender himself to the custody of the said Circuit Court for Ingham County" and that although demand for physical custody has been made by deponent of

(Continued on page 12)

Affidavit of LEO A. FARHAT in support of present requisition.

STATE OF MICHIGAN }
COUNTY OF INGHAM } ss.

LEO A. FARHAT, being duly sworn, deposes and says that he is the only duly elected, qualified and acting Prosecuting Attorney in and for the County of Ingham, State of Michigan; that heretofore, to-wit: on the 8th day of August, 1955 the issuance of a criminal warrant was authorized charging one Benjamin D. Ritholz with the crime of Offering and Giving a Bribe to Public Officers with the Intent and Purpose to Influence Their Acts, Opinions, Decisions and Judgments in Connection With a Certain Proceeding, to-wit: A Hearing on a Complaint then Pending Before Said Public Officers as Members of the Michigan State Board of Examiners in Optometry. That the said Benjamin D. Ritholz was duly convicted of said offense by a jury. That on the 6th day of August, 1956 said defendant was sentenced to serve a term of imprisonment of not less than two years nor more than four years at the State Prison of Southern Michigan at Jackson, Michigan, and pay a fine of $2,000.00.

That thereupon said defendant appealed, after leave therefor was duly allowed, to the Supreme Court of the State of Michigan and he was admitted to bail on March 13, 1958, the bond therefor being set at $20,000.00. That the Supreme Court for the State of Michigan affirmed said conviction and sentence, continued said bond until determination of defendant's motion for rehearing and stay of imprisonment pending appeal to the Supreme Court of the United States in event of denial of rehearing, both of which motions were, on the 11th day of July, 1960 denied by the Supreme Court of the State of Michigan, all of which more fully appears from instruments and documents attached to this application. Further, that defendant's application for leave to appeal to the United States Supreme Court, filed on October 6, 1960, was denied without opinion by said Court on December 5, 1960.

That the said Benjamin D. Ritholz, by the terms of said $20,000.00 cash bond was obligated "if his conviction is affirmed" to "surrender himself to the custody of the said Circuit Court for Ingham County" and that although de-

(Continued to page 13)

defendant's attorneys **the said Benjamin D. Ritholz has wilfully refused, failed and neglected to surrender himself as set forth above, and has therefor breached the terms of his bail.** (Emphasis added)

Your deponent further says that he is familiar with the laws of the State of Michigan and that said offense of which defendant was convicted constitutes a felony under the laws of the State of Michigan, particularly Section 117 of Act 328, P.A 1931; being C.L. 1948, 750.117, M.S.A 28.312 —a copy of said statute being attached hereto and made a part hereof.

Your deponent further says that Jack Lechler, Ingham County Sheriff, is a suitable person to act for the County of Ingham and State of Michigan in the extradition of Benjamin D. Ritholz. Your deponent further says that he has prepared for immediate filing an application for a requisition from the Governor of the State of Michigan to the Governor of Illinois, requesting the issuance of a Governor's Warrant and directing that the said Benjamin D. Ritholz be delivered and rendered to Sheriff Jack Lechler of the County of Ingham, State of Michigan.

Your deponent further says that in seeking a Governor's Warrant from the Governor of Illinois, as aforesaid, these proceedings have been taken in accordance with Michigan Law and the Law of the State of Illinois; further that these proceedings are being taken solely for the purpose of the administration of public justice and not for the enforcement of any private claim.

Your deponent further says that attached to this affidavit is a photograph of Benjamin D. Ritholz mentioned in this affidavit and in the application for requisition.

Jack W. Warren
Jack W. Warren
Ingham County Prosecuting Attorney
State of Michigan

Subscribed and sworn to before me, a Municipal Judge, this 20 day of July, A.D. 1960.

Earl L. McDonald
Municipal Judge in and for the City of Lansing, County of Ingham and State of Michigan.

mand for physical custody has been made by deponent and deponent's predecessor in office of defendant's attorneys the said Benjamin D. Ritholz **has wilfully refused, failed and neglected to surrender himself as set forth above, and has therefor breached the terms of his bail.** (Emphasis added)

Your deponent further says that he is familiar with the laws of the State of Michigan and that said offense of which defendant was convicted constitutes a felony under the laws of the State of Michigan, particularly Section 117 of Act 328, PA 1931, being CL 1948, 750.117, M.S.A. 28.312 —a copy of said statute being attached hereto and made a part hereof.

Your deponent further says that Kenneth L. Preadmore, Ingham County Sheriff, is a suitable person to act for the County of Ingham and State of Michigan in the extradition of Benjamin D. Ritholz. Your deponent further says that he has prepared for immediate filing an application for a requisition from the Governor of the State of Michigan to the Governor of Illinois, requesting the issuance of a Governor's Warrant and directing that the said Benjamin D. Ritholz be delivered and rendered to Sheriff Kenneth L. Preadmore of the County of Ingham, State of Michigan.

Your deponent further says that in seeking a Governor's Warrant from the Governor of Illinois, as aforesaid, these proceedings have been taken in accordance with Michigan Law and the Law of the State of Illinois; further that these proceedings are being taken solely for the purpose of the administration of public justice and not for the enforcement of any private claim.

Your deponent further says that attached to this affidavit is a photograph of Benjamin D. Ritholz mentioned in this affidavit and in the application for requisition.

Leo A. Farhat
Leo A. Farhat
Ingham County Prosecuting Attorney
State of Michigan

(Photograph) to before me, a Municipal Judge, this 26th day of

Earl E. McDonald
Municipal Judge in and for the City of Lansing, County of Ingham and State of Michigan.

Reasons for Granting Writ

a. The Supreme Court of Illinois has decided a federal question of substance not theretofore determined by this Court.

The whole field of interstate extradition is one which, while controlled by the constitution and statutes of the United States has been permitted to evolve almost wholly through the medium of state court opinions. This was not always so. In the early days of the nation this court had before it several important extradition cases the most historic being *Kentucky* v. *Dennison*, 24 How. 66. Throughout the latter part of the 19th century and the first two and a half decades of this century this court has before it a series of extradition cases which are landmarks in the field. *Roberts* v. *Reilly*, 116 U.S. 80, *Taylor* v. *Taintor*, 16 Wall. 366, *Appleyard* v. *Commonwealth*, 203 U.S. 222, *Hyatt* v. *People ex rel Corkran*, 188 U.S. 691, and *Innes* v. *Tobin*, 240 U.S. 127, all made important contributions to the law concerning interstate extradition. The *Innes* case, decided in 1916 marks the end of this series of cases, and since that time the interstate extradition cases decided by this court have been few. Since the development of this court's discretionary jurisdiction only one case, *Sweeney* v. *Woodall*, 344 U.S. 86, involving an attempt to circumvent extradition by claiming that the petitioner would be abused in the prison of the demanding state.

The time is now ripe for this court to undertake an examination of extradition procedure; and this case presents to this court the vehicle by which this may be done. As we show below the case is meritorious. There is presented a serious question that the extraditability of the petitioner had been inquired into in a prior proceeding and he was found not to be extraditable. There has grown over the

years a conflict of decisions in the various states as to whether *res judicata* is an applicable doctrine in extradition. Both Colorado and Missouri have reached conclusions diametrically opposed to the State of Illinois, as we will show hereinafter. In order that order may be put into the body of law concerning extradition, this court should grant the petition for a writ of certiorari in this case.

b. Merits of the case.

In *People ex rel. Ritholz* v. *Saia*, 24 Ill. 2d 168, 180 N.E. 2d 464, hereinafter sometimes referred to as the First *Ritholz* Case, the demand and the warrant recited that they were based upon a "Complaint and Warrant"; nevertheless the requisition papers showed that the relator had been "tried, convicted, sentenced and fined on August 6, 1956, of the crime of bribing public officers, that such conviction and sentence was appealed to and finally affirmed by the Supreme Court of Michigan on March 11, 1960, that he was admitted to bail pending the outcome of his appeal, and that he became a fugitive from justice of that State by his failure to surrender himself upon the affirmance of his conviction." (*People ex rel. Ritholz* v. *Saia*, 24 Ill. 2d 168, 173)

The relator in this case is demanded by the State of Michigan as a fugitive for having been convicted of the crime of bribery. The theory upon which the Governor of Michigan made his demand and upon which the Governor of Illinois issued his warrant in this case is found in Section 3 of the Uniform Criminal Extradition Act (Ill. Rev. Stat. (1961) Ch. 60, par. 20) which reads as follows:

> "No demand for the extradition of a person charged with crime in another state shall be recognized by the Governor unless in writing * * * and accompanied * * * by a copy of a judgment of conviction or of a sentence imposed in execution thereof, together with

a statement by the Executive Authority of the demanding state that the person claimed has escaped from confinement or has broken the terms of his bail, probation or parole.

That section of the statute provides two other theories upon which a demand for extradition may be based. They are that the demand be accompanied by either (1) "a copy of an indictment found or by information supported by affidavit in the state having jurisdiction of the crime," or (2) "by a copy of an affidavit made before a magistrate there, together with a copy of any warrant which was issued thereupon."

As the Supreme Court of Illinois held in the prior case involving this petitioner, a demand and warrant predicated upon one of the three theories cannot be sustained by requisition papers which show the presence not of that theory but of another.

The State of Michigan in its demand and the Governor of the State of Illinois in his warrant in the First *Ritholz* case could have proceeded upon the theory that the relator had been convicted of a crime and had broken the terms of his bail. They did not do so. The Supreme Court of Illinois held in that case that the contradiction between the requisition papers on the one hand and the demand and warrant on the other did not constitute "a mere technicality" (24 Ill. 2d 168, 174) but constituted a failure to comply with the substantive terms of the statute which was fatal.

Counsel for respondent knew of the existence of the Prosecutor's Affidavit in the first *Ritholz* case charging "bail jumping." In his "Brief and Argument for Respondent-Appellant" (case No. 36756, pp. 7-8) Counsel states:

> "Here is an affidavit, sworn to before a Magistrate by the prosecuting attorney, that Ritholz was convicted of the crime of bribery, the conviction was affirmed, the relator was sentenced to the penitentiary, but that he refused to surrender himself and had breached the terms of his bail" (Abst. 6 8).

It is obvious that the prosecuting attorney of the demanding state was attempting to lay the foundation for extradition because of bail jumping. However the Governor of Michigan chose to proceed upon the theory that the relator was charged with crime of bribery. Inasmuch as the State of Michigan is the real party in interest in this matter it ought to be bound by its former actions just as any private person.

It is evident therefore that the failure of the State of Michigan to proceed upon the proper theory and the failure of the Governor of Illinois to issue his warrant upon the proper theory, even though that theory could have been asserted by both the State of Michigan and the Governor of the State of Illinois causes the judgment of the Criminal Court of Cook County as affirmed by the Supreme Court of Illinois to stand as a bar to any subsequent attempt by the State of Michigan to extradite the petitioner for having been convicted of the crime shown in the requisition papers in the First *Ritholz* case.

The rule of *res judicata* was stated in *Phelps* v. *City of Chicago*, 331 Ill. 80, 85, 162 N.E. 119, 122, as follows:

> The rule of *res judicata* embraces not only what actually was determined in the former case between the same parties or their privies, but it extends to any other matters properly involved which might have been raised and determined. [Citing Cases]. The rule of *res judicata*, or estoppel by judgment where there is no want of jurisdiction is operative whether the judgment be erroneous or not.

The Appellate Court of Illinois, First District, after citing the above language, went on to say: (*Ernest Freeman & Co.* v. *Robert G. Regan Co.*, 332 Ill. App. 637, 644-645, 76 N.E. 2d 514, 517.)

> A mere change in the theory of what is essentially a single cause of action may not be sufficient to prevent the application of the doctrine of *res judicata*, especially where the questions raised in the second action might have been litigated in the first suit. A party cannot preserve the right to bring a second action after the loss of the first merely by having circumscribed and limited the theories of recovery opened by the pleadings in the first.

The purpose of the doctrine of *res judicata* has been lucidly explained by Mr. Justice Frankfurter in *Angel* v. *Bullington*, 330 U.S. 183, 192-193:

> The doctrine of *res judicata* reflects the refusal of law to tolerate needless litigation. Litigation is needless if, by fair process, a controversy has once gone through the courts to conclusion. Compare, *e.g.*, *Hazel-Atlas Glass Co.* v. *Hartford Empire Co.*, 322 U.S. 238, 244, 64 S.Ct. 997, 1000, 88 L.Ed. 1250. And it has gone through, if issues that were or could have been dealt with in an earlier litigation are raised anew between the same parties. *Chicot County Drainage Dist.* v. *Baxter Bank*, 308 U.S. 371, 60 S.Ct. 317, 84 L.Ed. 329.

(To same effect, see *Heiser* v. *Woodruff* (1946), 327 U.S. 726 at 735)

That that rule should apply in the present case is readily apparent. As we shall show herein, the facts in both this case and the First *Ritholz* Case are **identical**, a hearing was had in the first case on the merits and only the theory is changed and that theory **could have and should have** been advanced in the First *Ritholz* Case.

In the First *Kitholz* Case, on the 16th day of December, 1960, the Governor of Illinois, proceeding upon a demand by the Governor of the State of Michigan, issued a warrant for the extradition of the relator herein to the State of Michigan. The demanding papers showed that the petitioner had been convicted of the crime of bribery in the Circuit Court for the County of Ingham, Michigan, on the 6th day of August, 1956, in cause 11871; that the relator had appealed that conviction to the Supreme Court of Michigan, and pending appeal had posted bond of Twenty Thousand Dollars; that the matter was affirmed on appeal and that **the relator forfeited his bond.**

The requisition papers in the present case show that the petitioner was convicted of the crime of bribery in the Circuit Court for the County of Ingham, Michigan, on the 6th day of August, 1956, in cause 11871; that the relator had appealed that conviction to the Supreme Court of Michigan, and pending appeal had posted bond of Twenty Thousand Dollars; that the matter was affirmed on appeal and that **the relator forfeited his bond.**

In the First *Kitholz* Case, *habeas corpus* proceedings in the Criminal Court of Cook County were had for the purpose of determining the validity of the extradition of the relator herein under the warrant of December 16, 1960. The Criminal Court sustained the petition for writ of *habeas corpus* and the petitioner was discharged. The respondent sheriff appealed. Upon appeal the Supreme Court of Illinois affirmed and said in part:

> . . . [I]t is our opinion that the requisition or demand was insufficient to justify the issuance of the rendition warrant, which is the only authority here shown for detaining the relator. Accordingly, the judgment of the criminal court of Cook County discharging the relator is affirmed. (24 Ill. 2d 168, 175)

The sufficiency of the warrant and requisition papers is in Illinois a question of evidence, *People ex rel. Rukavina* v. *Sain*, 22 Ill. 2d 546, for together if in proper form they constitute the *prima facie* case which it is the duty of the relator to overcome; *People ex rel. Borelli* v. *Sain*, 16 Ill. 2d 321, *People ex rel. Mack* v. *Meyering*, 355 Ill. 456. The conclusion of the Supreme Court of Illinois that the requisition papers were insufficient to justify the issuance of the rendition warrant was a determination of the question of whether there was sufficient evidence to prove that the relator was extraditable under the theory advanced by the State of Michigan and adopted by the Governor of Illinois. Thus the former hearing was one on the merits of the case in which the relator was discharged for failure of the respondent to sustain his burden of proof on his theory. (For definition of "trial on merits" see *Stephenson* v. *Boswell* (Ky. Ct. of App.) 319 S.W. 2d 457) An order of discharge entered in a *habeas corpus* proceeding by a court possessing jurisdiction conclusively determines that the prisoner was not liable to be held in custody upon the state of facts then existing. *People ex rel. Titzel* v. *Hill*, 344 Ill. 246.

In a case similar to the case at bar the Court of Appeals of the District of Columbia, had before it a case in which an alleged fugitive was contesting the validity of his removal from one Federal district to another. In a prior proceedings he had been discharged upon a writ of *habeas corpus*. The United States Marshal then rearrested him upon a subsequent warrant of removal for the same offense. The Court of Appeals said in *Palmer* v. *Thompson* (C.A. D.C.) 20 App. D.C. 273, 284:

> But the decision rendered by the Supreme Court of District of Columbia, or by the justice of that Court who heard the cause, on June 5, 1888, whereby the

appellee was discharged from the custody in which he was then held, although in our opinion erroneous, is an accomplished fact. It was an adjudication of the question at issue. The subject-matter of the controversy became thereafter *res judicata*; and it was pleaded as such in the present proceedings. We cannot now correct the error that was then committed. We have only to look to the fact that there was then an adjudication on the same subject matter that is involved in the present proceedings; and that no new ground is shown for holding the appellee *which did not exist at the time of his former discharge*. The *habeas corpus* act of Charles II, universally in force in this country, either in its original form or by substantial re-enactment, prohibits the recommitment for the same charge of one who has previously been discharged therefrom under the writ. The authorities are believed to be unanimous that a second arrest for the same precise charge *without any new circumstances* to justify the arrest, cannot be sustained. The law is well stated in the case of the *United States* v. *Chung Shee*, 71 Fed. Rep. 277, where it was said:

> "If a prisoner is discharged from custody on the hearing of a writ of *habeas corpus*, such order or judgment amounts to an adjudication, and is conclusive in his favor as matter *res adjudicata* if he should be again arrested, unless some fact could be shown for holding him *which did not exist at the time of his discharge*." [emphasis added]

The arrest of the appellee in 1888 was for his removal to the State of Tennessee to receive sentence there. That is the purpose of his present or recent arrest. The question in issue was whether he could lawfully be removed under the circumstances of the case. The same precise question under precisely the same circumstances is now again raised; and while we think that the former release was based upon an erroneous construction of the law, we think we are compelled to give it effect as a final adjudication.

The case of *United States* v. *Chung Shee* (D.C. Cal.) 71 Fed. 277, cited in the *Palmer* case above, is a case involving the deportation of a person whose entry into the United States had previously been approved by an adjudication in a *habeas corpus* proceeding. The government again attempted to have her deported and again she petitioned for a writ of *habeas corpus*. The District Judge ordered her released, holding that the determination of an alien's claim to enter the country "is an adjudication of the right involved, namely the right of the alien to enter the country, and such adjudication is final, unless the law expressly or impliedly provides for an appeal from or review of the decision." (71 Fed. 277, 1[illegible])

Analogizing the *Chung Shee* case to the case at bar, it may be seen that the adjudication of the criminal court of Cook County and the Supreme Court of Illinois in the prior case made the determination of the petitioner's right not to be extradited, in other words, of his right to remain in Illinois. Such determination is an adjudication which cannot be made the subject of any subsequent inquiry.

The proposition that a hearing on the merits of an extradition proceeding is an adjudication which cannot be inquired into upon a further request for extradition, was favorably commented upon in *Muller's* case (D.C. Pa.) Fed. Cas. 9913, where the court said:

> . . . At my request, the case has been reargued on all points before the judge of the Supreme Court for the circuit and myself. The only question which has caused us any embarrassment is that of the effect of the party's discharge in Ohio. Had that been a decision on the merits of the case, pronounced after full investigation and consideration of them, our opinion might probably have been that a renewal of the Saxon government's application should not be entertained. But the proceeding there, as far as we know, consisted in

> the summary rejection of the evidence offered, for what reason we are not informed.

Thus it is seen that after a hearing on the merits of the cause for extradition, a discharge of the alleged fugitive upon writ of *habeas corpus* is a final adjudication which can be reversed only by appeal and is otherwise a final order and the matters determined are *res judicata*.

The Supreme Court of Colorado had occasion to decide a case in which Texas had made repeated attempts to extradite the plaintiff in error. In the first case, Texas had proceeded upon the theory that he had broken his "conditional pardon." He was discharged on *habeas corpus*. Thereafter, Texas proceeded to attempt to extradite him on the theory that he was a "clemency violator," and again, the plaintiff in error sought his discharge upon *habeas corpus* which was denied by the trial Court. In reversing the second *habeas corpus* proceeding the court said as follows (*Scigler* v. *Canterbury* (Sup. Ct. of Colo., 1957) 318 P. 2d 219, 220):

> In 1955, the demand for extradition made by the Texas authorities was that petitioner had broken his "conditional pardon." The documents in the record in the present demand for extradition disclose that petitioner is wanted by Texas as a "clemency violator." If it could be said there is a distinction between the demand in 1955 and the one in January of 1957, it is one, which in fact and in law, is without a difference. We find nothing in the record to indicate any irregularity in the original extradition proceedings. Counsel for defendant in error, in opposing application of the doctrine of *res judicata*, states, "Here, there had been no determination on the merits, . . ." There is no support in the record for that statement; moreover, the record discloses that at the hearing, petitioner attempted to introduce into evidence documents that were offered in April of 1955 at the hearing then had, but this offer was denied.

Such could hardly occur except at a hearing; moreover, when this offer of petitioner was denied he was precluded from showing that the basis of the previous decision was the same as is now before the court.

We fail to understand any contention that might be made to the effect that the rule of *res judicata* does not apply in such proceedings. If laws, or rules of law, are to be respected they must be respectable. Where the later charge is identical and for the same and exact offense that was determined in the first demand, and is adjudicated, then the doctrine or rule of *res judicata* applies with equal force as elsewhere.

"To support the plea of *res adjudicata* the burden was upon the relator to show that some issue had been heard and determined in his favor in the prior proceedings, of such a nature as to constitute an estoppel upon a reinvestigation of the same question." *In re White*, C.C., 45 F. 237, 239.

"If an alleged fugitive has been discharged from arrest through *habeas corpus* proceedings, after a trial on the merits, he may, if rearrested for extradition for the same offense, plead *res judicata*; * * *." 35 C.J.S. Extradition § 18, p. 347.

The Missouri Court of Appeals has likewise subscribed to this doctrine in an extradition case, saying: (*Ex Parte Messina*, Mo. Ct. of App. 1939, 128 S.W. 2d 1082, 1084):

> Experience has taught us that in the certainty of the law lies the protection of the law. It follows that when a matter of dispute be determined by trial and judgment of court, all matters known as going to the determination of the controversy must be determined by the judgment. Otherwise, we would be harassed by multiplicity of suits over the same subject matter.
>
> With the above fundamental principles considered, one needs but to exercise his powers of thought to understand that a solemn judgment of record must be given verity and stand unless the same has been changed by due process of law that provides protec-

> tion to all concerned. Such due process of law is amply provided in the procedure pointed out above and if not followed all judicial procedure becomes mockery, and protection of life, liberty and the pursuit of happiness becomes abolished.

One last case must be cited which, while it is not an extradition case, nevertheless stands for the proposition that once a theory has been advanced in an administrative proceeding or an administrative officer has advanced one theory for his action, a testing of that theory by *habeas corpus* stands as a bar to any further action based upon the same set of facts but upon a different theory which could have been advanced in the first determination. In *Anselmo* v. *Hardin*, 3 Cir., 1958, 253 F. 2d 165, the appellant appealed from an adverse judgment of the District Court on his complaint under the Federal Declaratory Judgment Act. Prior to that action the Government had attempted to deport Anselmo on the basis that he had entered the country without an unexpired visa. He contested the deportation by way of *habeas corpus;* the District Court found that there was no evidence to sustain the Government's theory and eventually the writ of *habeas corpus* issued and Anselmo was discharged. Thereafter the Government began a new deportation proceeding alleging the lack of an unexpired visa and additionally that Anselmo had entered the United States without inspection. Anselmo then brought his action under the Declaratory Judgment Act. The Court of Appeals for the Third Circuit held that the entry without inspection charge could have been brought in the first deportation proceeding. Judge Kalodner, speaking for the court, said:

> The Government's injection of the "entry without inspection" charge into the second deportation proceeding in February, 1953—almost five years after they were commenced on March 11, 1948—constitutes an attempt at interposition of the 1952 Act to avoid

the effect of the *habeas corpus* judgment. Its contention that Section 241(d) of the 1952 Act "expressly excepts the charge of deportability for entry without inspection from the application of the 'savings clauses' in Section 405(a)" is tantamount to an assertion in the instant case that the 1952 Act has made inapplicable to deportation proceedings the doctrine of *res judicata*. We cannot subscribe to such a contention. If we did we would be compelled to consider the constitutionality of the provisions of the 1952 Act relied on by the Government. The cases cited by the Government are inapposite. So are *Lehmann* v. *United States ex rel. Carson*, 1957, 353 U.S. 685, 77 S.Ct. 1022, 1 L.Ed. 2d 1122, and *Malcahey* v. *Catalanotte*, 1957, 353 U.S. 692, 77 S.Ct. 1025, 1 L. Ed. 2d 1127. In the latter two cases there had not been a judgment prior to the deportation proceedings determining the nondeportable status of the alien sought to be deported as there was in the instant case.

In plain terms the Government is seeking here to scrap the doctrine of *res judicata* as far as it applicability to *habeas corpus* is concerned. It is attempting to deprive Anselmo of the rule which we stated in *United States* v. *De Angelo*, 3 Cir., 1943, 138 F. 2d 466, at page 468, namely, a "'rule of evidence' * * * 'which accords to the accused the right to claim finality with respect to a *fact or group of facts* previously determined in his favor upon a previous trial.'" (Emphasis supplied.) The "fact or group of facts" here determined by the *habeas corpus* judgment was Anselmo's entry into the United States prior to July 1, 1924, and the applicability of the provisions of the 1917 Act under which he was not deportable. The cases are legion that, as earlier stated, a judgment in *habeas corpus* proceedings discharging the petitioner for the writ is *res judicata*. To *Collins* v. *Loisel*, [262 U.S. 426], may be added the early case of *United States* v. *Chung Shee*, 9 Cir., 1896, 76 F. 951, 956, a deportation proceeding; *Harris* v. *Biszkowicz*, 8 Cir., 1939, 100 F. 2d 854, also a deportation case; and the recent case of

In re Bailleaux, 1956, 47 Cal. 2d 258, 302 P. 2d 801, 802, 803. See also *Cruz-Sanchez* v. *Robinson*, D.C. S.D. Cal. 1955, 136 F. Supp. 52, affirmed 9 Cir., 1957, 249 F. 2d 771.

The attempt to extradite the petitioner in this case upon a theory which could have been advanced in the First *Ritholz* Case must be barred by the judgment in that case. A person who has been the subject of an attempted extradition is as entitled to the doctrine of finality of judgment as any other litigant, if not more so.

CONCLUSION.

For the above and foregoing reasons, a Writ of Certiorari should issue from this Court to review the judgment of the Supreme Court of Illinois rendered in this case.

Respectfully submitted,

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APPENDIX A

Opinion of the Supreme Court of Illinois

The People ex rel. Benjamin Ritholz, Appellant,

vs.

Frank G. Sain, Sheriff, Appellee.

Mr. Justice House delivered the opinion of the court:

Benjamin D. Ritholz was first arrested for the purpose of extradition by Frank G. Sain, sheriff of Cook County, under authority of a rendition warrant issued on December 16, 1960, by the Governor of Illinois on requisition of the Governor of Michigan. A petition for writ of *habeas corpus* was filed in the criminal court of Cook County to test the legality of the arrest and detention and the writ was issued. After a hearing the trial court ordered that Ritholz be discharged and in *People ex rel. Ritholz* v. *Sain*, 24 Ill. 2d 168, we affirmed the judgment of the trial court on the ground that the requisition was insufficient to justify the issuance of the rendition warrant.

Another requisition was then made by the Governor of Michigan charging the same crime but eliminating the defects that made the first requisition insufficient. The Governor of Illinois issued another rendition warrant on January 31, 1962, and Ritholz was again taken into custody by sheriff Sain. Another petition for a writ of *habeas corpus* was filed in the criminal court of Cook County, the writ issued and the sheriff filed his return. A verified traverse to the return was filed in which it was alleged that the prior discharge is *res judicata* of all issues raised in this second proceeding and bars the State from now extraditing relator. After a hearing on the issue raised by the traverse, the writ was quashed and relator remanded to the custody of the sheriff for delivery to the agent of the Governor of Michigan. Relator has appealed directly to this court.

The only question presented in the trial court and on this appeal is whether the first discharge is *res judicata* of all issues raised in this proceeding and bars the State from now extraditing the relator.

The nature of extradition proceedings has been aptly described by the United States Supreme Court as assimilating "very closely those commenced in any state for the arrest and detention of an alleged criminal. They go upon the theory that extradition is but a mere step in securing the presence of the defendant in the court in which he may lawfully be tried." (*In re Strauss*, 197 U.S. 324, 333, 49 L. ed 774, 25 S. Ct. 535, 537.) We turn therefore to the general policy expressed by the legislature with regard to the discharge on writ of *habeas corpus* of an alleged criminal.

Section 26 of an act to revise the law in relation to *habeas corpus* (Ill. Rev. Stat. 1961, chap. 65, par. 26) provides that "No person who has been discharged * * * on a *habeas corpus*, shall be again imprisoned, restrained or kept in custody for the same cause, * * *." The section further provides, however, that "The following shall not be deemed to be the same cause: 1. If, after a discharge for a defect of proof, or any material defect in the commitment, in a criminal case, the prisoner should be again arrested on sufficient proof, and committed by legal process for the same offense. * * * 3. Generally, whenever the discharge has been ordered on account of the non-observance of any of the forms required by law, the party may be a second time imprisoned if the cause be legal and the forms required by law observed."

Furthermore, in *People ex rel. Mark* v. *Toman*, 362 Ill. 232, this court held that a prior discharge on *habeas corpus* in an extradition proceeding because of a defect in the process or evidence will not bar a subsequent extradition proceeding for the crime on additional evidence or on new process. This holding is in harmony with decisions from

other jurisdictions on the question. See 39 C.J.S., Habeas Corpus, sec. 104(b)(1); 25 Am. Jur., Extradition, sec. 157; Annotation, 102 A.L.R. 383.

Here the original requisition was insufficient because the demand recited as its jurisdictional basis that relator stood charged of a crime by virtue of a complaint and warrant, whereas a supporting affidavit showed that he had been convicted of the crime and broken the terms of his bail, which is a separate jurisdictional basis. Relator was discharged, therefore, not because the court decided he was not a fugitive from justice, but because the contradiction of jurisdictional bases between the demand and the supporting papers constituted a nonobservance of the form required by law for his extradition.

Relator has relied heavily on *Palmer* v. *Thompson*, 20 App. D.C. 273; *Seigler* v. *Canterbury*, 136 Colo. 413, 318 P. 2d 219; and *Ex Parte Messina*, 233 Mo. App. 1234, 128 S.W. 2d 1082, in each of which cases it was held that a previous discharge on *habeas corpus* in an extradition proceeding was a bar to a subsequent extradition proceeding for the same crime. While there is language in those cases which supports relator's contention, each one involved a situation where the demand and supporting evidence in the subsequent proceeding appears to have been the same as that used in the previous hearing wherein the discharge was ordered.

We hold that the judgment ordering relator discharged because of an insufficient demand is not a bar to the present extradition proceeding based on a perfected demand. (Ill. Rev. Stat. 1961, chap. 60, par. 20; *People ex rel. Mark* v. *Tomar*, 362 Ill. 232.) The order of the criminal court of Cook County quashing the writ of *habeas corpus* and ordering relator remanded to the custody of the sheriff of Cook County for delivery to the agent of the Governor of Michigan is affirmed.

Judgment affirmed.

APPENDIX B

Constitutional and Statutory Provisions

United States Constitution, Article IV, Section 2, Clause 2:

A person charged in any state with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the Crime.

Title 18, United States Code, Section 3182:

Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State, District or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, the executive authority of the State, District or Territory to which such person has fled shall cause him to be arrested and secured, and notify the executive authority making such demand, or the agent of such authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within thirty days from the time of the arrest, the prisoner may be discharged. June 25, 1948, c. 645, 62 Stat. 822.

Uniform Criminal Extradition Act, Sections 2 and 3 (Illinois Revised Statutes (1961) Chapter 60, Sections 19 and 20):

§ 2. Subject to the provisions of this Act, the provisions of the Constitution of the United States controlling, and any and all acts of Congress enacted in pursuance thereof, it is the duty of the Governor of this State to have arrested and delivered up to the Executive Authority of any other state of the United States any person charged in that State with treason, felony, or other crime, who has fled from justice and is found in this State.

§ 3. No demand for the extradition of a person charged with crime in another state shall be recognized by the Governor unless in writing alleging, except in cases arising under Section 6, that the accused was present in the demanding state at the time of the commission of the alleged crime, and that thereafter he fled from the state, and accompanied by a copy of an indictment found or by information supported by affidavit in the state having jurisdiction of the crime, or by a copy of an affidavit made before a magistrate there, together with a copy of any warrant which was issued thereupon; or by a copy of a judgment of conviction or of a sentence imposed in execution thereof, together with a statement by the Executive Authority of the demanding state that the person claimed has escaped from confinement or has broken the terms of his bail, probation or parole. The indictment, information, or affidavit made before the magistrate must substantially charge the person demanded with having committed a crime under the law of that state; and the copy of indictment, information, affidavit judgment of conviction or sentence must be authenticated by the Executive Authority making the demand.